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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 MARVIN GOLDSTON, JR.,  
12 CDCR #T-07388

13 Plaintiffs,

14 vs.

15  
16 RANDALL TOREZZ; UNKNOWN  
17 PSYCHIATRIST,

18 Defendants.  
19  
20

Civil No. 11cv1904 BTM (MDD)

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED *IN FORMA*  
*PAUPERIS* [ECF No. 3]; AND**

**(2) SUA SPONTE DISMISSING  
COMPLAINT AS FRIVOLOUS  
PURSUANT TO 28 U.S.C.  
§ 1915(e)(2) & § 1915A**

21 Plaintiff, Marvin Goldston, currently incarcerated at California State Prison located in  
22 Represa, California and proceeding pro se, has filed a Complaint pursuant to 42 U.S.C. § 1983.  
23 In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") [ECF No. 3].

24 **I. Motion to Proceed IFP**

25 All parties instituting any civil action, suit or proceeding in a district court of the United  
26 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
27 U.S.C. § 1914(a). An action may proceed despite a party's failure to prepay the entire fee only  
28 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*

1 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,  
 2 remain obligated to pay the entire fee in installments, regardless of whether the action is  
 3 ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

4 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.  
 5 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to  
 6 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that  
 7 he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4)  
 8 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 3] and assesses no  
 9 initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the  
 10 filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant to the  
 11 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## 12 **II. Initial Screening per 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)**

### 13 **A. Standard of Review**

14 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
 15 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused  
 16 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
 17 conditions of parole, probation, pretrial release, or diversionary program," "as soon as  
 18 practicable after docketing." *See* 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
 19 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion  
 20 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from  
 21 defendants who are immune. *See* 28 U.S.C. § 1915(e)(2)(B) and § 1915A.

22 As currently pleaded, it is clear that Plaintiff's Complaint fails to state a cognizable claim  
 23 under 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements upon a  
 24 claimant: (1) that a person acting under color of state law committed the conduct at issue, and  
 25 (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the  
 26 Constitution or laws of the United States. *See* 42 U.S.C. § 1983.

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1 Plaintiff's Complaint contains a number of rambling statements and it is difficult to  
 2 discern the nature of his claims. While far from clear, it appears that Plaintiff is seeking to sue  
 3 a psychiatrist based on his role in a study during which Plaintiff was taken off psychiatric  
 4 medication. (*See* Compl. at 3-4.) Plaintiff indicates that after he was taken off medication he  
 5 began to hear voices that told him to commit a robbery. (*Id.* at 4-5.)

6 First, the Court finds that Plaintiff has already brought identical claims in a previous  
 7 action. A court "may take notice of proceedings in other courts, both within and without the  
 8 federal judicial system, if those proceedings have a direct relation to matters at issue." *United*  
 9 *States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.  
 10 1992). A prisoner's complaint is considered frivolous under 28 U.S.C. § 1915A(b)(1) if it  
 11 "merely repeats pending or previously litigated claims." *Cato v. United States*, 70 F.3d 1103,  
 12 1105 n.2 (9th Cir. 1995) (construing former 28 U.S.C. § 1915(d)) (citations and internal  
 13 quotations omitted).

14 Second, while Plaintiff has attempted to bring this action pursuant to § 1983, there are no  
 15 federal law claims alleged in Plaintiff's Complaint. Federal courts are courts of limited  
 16 jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal  
 17 question jurisdiction exists over "civil actions arising under the Constitution, laws, or treaties  
 18 of the United States." 28 U.S.C. § 1331. Because Plaintiff's Complaint does not comply with  
 19 § 1331, there is no subject matter jurisdiction. The Court could exercise diversity jurisdiction  
 20 with regard to Plaintiff's malpractice claim only if Defendant Torrezz resides in a different State  
 21 than Plaintiff and the amount in controversy exceeds "the sum or value of \$75,000." 28 U.S.C.  
 22 § 1332. Plaintiff pleads no facts to support a finding of diversity jurisdiction in this matter.

23 For all these reasons, the Court dismisses Plaintiff's Complaint and will provide him with  
 24 an opportunity to file an Amended Complaint in order to correct the deficiencies of pleading  
 25 noted above.

### 26 **III. Conclusion and Order**

27 Good cause appearing, **IT IS HEREBY ORDERED** that:

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1           1.       Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 3] is  
2 **GRANTED.**

3           2.       The Secretary of California Department of Corrections and Rehabilitation, or his  
4 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee  
5 owed in this case by collecting monthly payments from the account in an amount equal to twenty  
6 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court  
7 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).  
8 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
9 **ASSIGNED TO THIS ACTION.**

10          3.       The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,  
11 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
12 Sacramento, California 95814.

13           **IT IS FURTHER ORDERED** that:

14          4.       Plaintiff's Complaint is **DISMISSED** without prejudice for lack of jurisdiction  
15 and as frivolous. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). However, Plaintiff is  
16 **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First  
17 Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's  
18 Amended Complaint must be complete in itself without reference to the superseded pleading.  
19 *See* S.D.CAL. CIVLR. 15.1. Defendants not named and all claims not re-alleged in the Amended  
20 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.  
21 1987).

22          Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief  
23 may be granted, it may be dismissed without further leave to amend and may hereafter be  
24 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79  
25 (9th Cir. 1996).

26           **IT IS SO ORDERED.**

27 DATED: December 29, 2011



**HON. BARRY TED MOSKOWITZ**  
**United States District Judge**